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No. 88-192

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

McKESSON CORPORATION,

Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND
TOBACCO, DEPARTMENT OF BUSINESS REGULATION,
AND OFFICE OF THE COMPTROLLER,
STATE OF FLORIDA,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF AMICUS CURIAE
U.S. OIL & REFINING CO.
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?
2. May a State, consistent with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

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STATEMENT OF INTEREST OF AMICUS CURIAE

U.S. Oil & Refining Co. ("U.S. Oil") is a Delaware corporation in good standing that does business in the states of Washington, Oregon, California and elsewhere. Under statutory threat of penalties, interest and business closure, U.S. Oil has paid the State of Washington certain amounts in accordance with Washington State business

and occupation tax statutes that this Court declared unconstitutional in *Tyler Pipe Industries v. Washington State Department of Revenue*, 483 U.S. 232 (1987). The State of Washington has refused to refund those amounts. See *National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988). U.S. Oil was a party in *Tyler Pipe* and *National Can*, and certain amounts paid by U.S. Oil between January 1, 1980 and June 15, 1985 were involved in those cases. Other amounts paid by U.S. Oil to Washington State between June 16, 1985 and July 23, 1987, were not directly at issue in those cases but were required to be paid under color of the same unconstitutional Washington statutes.

- The resolution of the questions the parties were directed to brief by this Court's Order dated July 3, 1989, will affect the likelihood of U.S. Oil recovering any of the amounts it was unconstitutionally required to pay.

SUMMARY OF ARGUMENT

The Fifth and Fourteenth Amendments to the United States Constitution forbid the taking of private property without just compensation. Although the imposition of a *lawful* tax does not constitute a taking, prior opinions of this Court establish that a taking occurs whenever a state unlawfully acquires private property. States requiring payment of unconstitutional taxes acquire private property unlawfully. Thus, states requiring payment of unconstitutional taxes must pay just compensation. States may not be relieved of their constitutional obligation to pay

just compensation for the taking of private property by choosing to call the taking a tax. Indeed, this Court has had occasion to hold a denial of a recovery of unlawful taxes paid under compulsion unconstitutional. Similarly, states may not evade their constitutional obligation to pay just compensation by prospectively applying the decision that finds the tax illegal or by claiming Eleventh Amendment protections. The constitutionally mandated just compensation remedy for a taking is self-executing and without exception.

ARGUMENT

I. THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION IS UNCONSTITUTIONAL.

The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment,¹ provides in pertinent part that:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987). This Court has long been of the view that the taking of private property by a state without just compensation is a denial of Fourteenth Amendment due process. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897). Thus, the Eleventh Amendment is no defense to a just compensation claim. See generally *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.") (citation omitted).

The right to just compensation for a taking springs directly from the Constitution and is not dependent on the availability or unavailability of other remedies. *First English Evangelical Lutheran Church v. County of Los Angeles*, *supra*, 482 U.S. at 316 n.9. Moreover, whenever a government unlawfully acquires property a taking occurs.² There are also no exceptions to the just compensation requirement.³ *Id.* at 318-21; *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960). Thus, just compensation is required regardless of the size of the taking⁴ or the extent of the governmental need.⁵

Here, as in *Tyler Pipe*, money was unlawfully required to be paid to a state. Money is property. Thus, the state must pay just compensation for the money taken.⁶

² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking.").

³ Not even the absence of actual damages removes the government's obligation to pay just compensation. *United States v. Pewee Coal Co.*, 341 U.S. 114, 118 (1951) ("[I]t is immaterial that governmental operation [of the coal mine] resulted in a smaller loss . . . [than] would have [been] sustained if there had been no seizure of the mines . . . [t]he crucial fact is that the government chose to intervene. . . .").

⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (seizure of 1/8 of a cubic foot of space on the roof of a Manhattan apartment building, though minor, is compensable).

⁵ *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure of coal mines during war held compensable).

⁶ Compensation for the time value of the money is also required. See *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923) (holding that where payment of just compensation is delayed, interest at a reasonable rate must be included).

II. A TAX MAY BE A TAKING.

In both *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916), and *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court held that an assessment for a local improvement that placed an exceptionally disproportionate burden upon certain parcels of property could be sufficiently extreme to constitute a taking. In *Norwood* the Court stated:

[T]he power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property.

172 U.S. at 278.

Similarly, in *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1915), this Court observed that it must be conceded that the Fifth Amendment would apply:

where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

240 U.S. at 24-25; see also *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937) ("[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.").

III. THIS COURT HAS PREVIOUSLY FOUND STATE DENIALS OF TAX REFUNDS UNCONSTITUTIONAL.

Here, as in *Tyler Pipe*, the discrimination was gross enough for the tax to be unconstitutional. Therefore, by unlawfully expropriating private property, Florida took property in the constitutional sense. If the tax is not refunded, the Fourteenth Amendment will be violated unless just compensation is paid.⁷ "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). In *Carpenter*, the State of Oklahoma argued that no refund was required because taxpayers paid the taxes untimely and taxpayers were only statutorily entitled to a refund of amounts paid timely. The Court in rejecting Oklahoma's argument relied in part on *Ward v. Love County*, 253 U.S. 18 (1920),⁸ where the Court wrote:

⁷ The Constitution does not prohibit the taking of property, only the taking of property without just compensation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). "If the Government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at 194 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)).

⁸ Respondent acknowledges *Ward* and *Carpenter*, see Br. Resp. at 17 n.17, but cannot adequately explain why Oklahoma's illegal acquisition of property in *Ward* and *Carpenter* was tantamount to a taking requiring just compensation in the form of a refund, while Florida's illegal acquisition of property may be remedied purely prospectively.

To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying it could take or appropriate the property of these Indians arbitrarily and without due process of law. Of course, this would be in contravention of the Fourteenth Amendment.

253 U.S. at 24.⁹

IV. JUST COMPENSATION IS THE CONSTITUTIONALLY DICTATED REMEDY FOR A TAKING.

The refund issues here, as in *Tyler Pipe*, "are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce."¹⁰ No matter what the attraction of a purely prospective remedy, the imposition of an unconstitutional tax has already occurred.¹¹ That imposition being a

⁹ *County of Mobile v. Kimball*, 102 U.S. 691 (1880), is distinguishable because it presented the question whether the imposition of a valid tax is a taking. Here, we are presented with invalid taxes. Moreover, the Court's observations in *Brushaber* and its holdings in *Ward* and *Carpenter* were issued some 35-50 years after *County of Mobile*.

¹⁰ *Tyler Pipe Indus. v. Dep't of Rev.*, 483 U.S. 232, 252 (1987) (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 at 276-77 (1984)).

¹¹ We question whether prospective application of a decision invalidating state taxes can be attractive in light of the policy enunciated in *Armstrong v. United States*, *supra*, 364 U.S. at 49 (the just compensation requirement "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

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taking, the constitution dictates the retroactive remedy of just compensation.¹²

Application of the constitutional remedy does not affect the state's right to prospectively apply its taxes even-handedly by eliminating the benefit. Neither does the requirement of just compensation affect a state's right to retroactively impose new taxes or, what is the equivalent, retroactively cure a previously imposed defective tax. However, such legislative action would ultimately result in courts (i) speculating whether retroactively collecting previously unimposed taxes is practically possible

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the public as a whole.") and *Owen v. City of Independence*, 445 U.S. 622, 654-55 (1980) ("It has been argued, however, that revenue raised for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston* - 'that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done. . . . After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.' ") (citation omitted, brackets in original).

¹² "Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, *supra*, 482 U.S. at 316 n.9.

(many taxpayers will have gone out of business, left the state's jurisdiction or otherwise have become judgment proof); (ii) determining whether such collection violates state statutes of limitation or notice provisions; and (iii) deciding whether such retroactive application violates the new taxpayers' due process rights. *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922), and *United States v. Heinszen*, 206 U.S. 370 (1907), illustrate some of the constitutional difficulties in retroactively imposing or curing tax statutes.

CONCLUSION

For the foregoing reasons, this Court should reverse the Florida Supreme Court's final decree with respect to its remedy and remand for a calculation of just compensation.

Respectfully submitted,

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